IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 3196 of 2004

with

CIVIL APPLICATION No 9879 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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EMPLOYEES STATE INSURANCE CORP

Versus

KISHANBHAI KALABHAI,S/O DECD. KALABHAI RAMABHAI

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Appearance:

MR SACHIN D VASAVADA for Appellant

MR KISHOR M PAUL for Respondent

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CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 15/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

Kalabhai Ramabhai, belonging to Scheduled Caste and working as Sweeper in Parshuram Pottery Works Company Ltd. was insured having insurance no.37/2900125. He died on 4th September, 1984 in the morning hours while on duty. About the incident in question, immediate information was given to the concerned officer of the factory. He was removed to the hospital where he was declared dead. His poor and illiterate widow Labhuben filed E.S.I. Application No.6/90 claiming dependency benefits on the death of her husband - deceased Kalabhai on 4th September, 1984. Reply (Exh.4) was filed on 27th February, 1991 on behalf of the Regional Director, E.S.I. Corporation, Ahmedabad - present appellant. On 13th March, 1997, application (Exh.6) was submitted by applicant Labhuben for producing documentary evidence on record and all the documentary evidence were taken on record in view of 'no objection' given by the advocate of the Corporation. Before her application came to be decided, unfortunately, Labhuben died during the pendency and final disposal of the application. Therefore, an application (Exh.11) for bringing her legal representatives on record of the case was filed by her son Kishanbhai Kalabhai - present respondent which was granted on 31st July, 2003. Accordingly, Kishanbhai has come on record as applicant of the case before the E.S.I. court. After considering the oral as well as documentary evidence led by the applicant and the written submissions dated 3rd March, 2004 filed by the present appellant Corporation, the learned Judge, E.S.I. Court No.1, Gujarat at Rajkot allowed the application and ordered the opponent - E.S.I. Corporation - present appellant to pay the dependency benefits to the applicant Kishanbhai, son of Kalabhai Ramabhai at the rate of 12% simple interest on it and also ordered to pay cost of Rs.1,000/- by his impugned judgment and order dated 7th April, 2004. This is challenged in this first appeal filed under Section 82 of The Employees' State Insurance Act, 1948 (for short, 'the Act') by the appellant - E.S.I. Corporation.

2. Mr. Vasavada, learned counsel for the appellant Corporation firstly submitted that deceased Kalabhai died way back on 4th September, 1984 and the application came to be filed by his widow Labhuben, for the first time, in 1990 i.e. after a period of almost six years after the death of deceased Kalabhai. He submitted that the said application was obviously time-barred and, therefore, the

learned Judge should have straightaway dismissed it on this ground alone. Mr. Vasavada submitted that he has raised five questions of law in this appeal and all are substantial questions of law which are required to be decided in this appeal and this question is one of them, which is framed in para 4(c), which is as under:

"WHETHER the ESI Court is right and justified in entertaining the ESI Application which was not filed within the limitation and which was filed almost after 6 years that too without explaining the cause of delay as prescribed under the Act?"

3. From the record and proceedings of the case, we find that this plea regarding limitation was never raised before the E.S.I. court and rightly so because of several judgments of the Hon'ble Supreme Court on this point that State Government and other Corporations, at least, should not take such technical plea of limitation etc. However, learned counsel Shri Vasavada for the appellant - Corporation submitted that though this specific plea was not raised by the Corporation in its written statement (Exh.4), this, being a pure question of law, was argued before the learned Judge but not dealt with by the learned Judge in his order. However, there is not even a whisper in the memo of appeal filed by the appellant - Corporation that though such contention of limitation was raised before the learned Judge, he has not dealt with the same in his judgment. In that view of the matter, such contention cannot be allowed to be raised. Even if such a contention was raised in the memo of appeal, then also we would not have entertained this plea, in view of the judgment of the Hon'ble Supreme Court in the case of STATE OF MAHARASHTRA vs. RAMDAS SHRINIVAS NAYAK AND ANOTHER reported in AIR 1982 SUPREME COURT 1249. Under the circumstances, we have not permitted learned counsel Shri Vasavada to raise this question of limitation for the first time in this appeal.

4. Mr. Vasavada then submitted that the applicant failed to prove that deceased Kalabhai died because of the injury received by him while on duty on 4th September, 1984. This, being a pure question of fact, cannot be considered in this appeal as U/s. 82 of the Act, as appeal would lie from an order passed by the Employees Insurance Court only on a substantial question of law. This and the other questions of law which have been framed by the appellant - Corporation in para 4 of this appeal are as under:-

(a) In light of the facts of present case and

in view of the provision of Section 2(8), WHETHER the ESI Court is right and justified holding that the death occurred / injury sustained by the opponent in the course of employment and out of employment?

(b) In facts of present case and in view of the provisions of the ESI Act, WHETHER not the opponent was suffering from the pre-existing disease viz. acute myocardial infarction?

(c) WHETHER the ESI Court is right and justified in entertaining the ESI Application which was not filed within the limitation and which was filed almost after 6 years that too without explaining the cause of delay as prescribed under the Act?

(d) WHETHER the diverse findings and conclusions of the ESI Court are right and justified and based on evidence obtaining on record or they are contrary to the weight of evidence on record AND WHETHER the ESI Court is right and justified in ignoring the fact that the present opponent was/is not a dependent as per the ESI Act and/or not giving opportunity to lead the evidence of the appellant witnesses' before the ESI Court?

(e) WHETHER the ESI Court is right and justified in replying the issues No.1 to 4 in affirmative AND WHETHER the impugned judgment and order is right, justified and sustainable in law and / or in facts of present case?

It cannot be said to be questions of law, much less substantial questions of law.

5. In view of the above discussion, we do not find any substance or merits in this appeal and in absence of it, this appeal is required to be dismissed.

6. Before parting, we must state that this appeal was simply admitted by another Division Bench of this court on 16th February, 2005 without framing substantial questions of law. Therefore, in absence of any substantial questions of law framed by the Division Bench of this court at the time of admission, this appeal was required to be dismissed straightaway as no substantial

question of law is to be decided by us in this appeal. The appeal is dismissed accordingly.

7. Now that the appeal is dismissed, it is hoped and trust that the appellant - Corporation shall now comply with the impugned judgment and order passed by the E.S.I. Court in letter and spirit as early as possible and not later than 31st July, 2005.

Civil Application for stay is dismissed as the main appeal is dismissed.

( B.J. Shethna, J. )

( M.C. Patel, J. )

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